Filed 5/28/04

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DAVID LAVELL WILLIAM HILL,<br>Defendant and Appellant. | A100958<br><br>(Marin County<br>Super. Ct. No. SC122887C) |

David Lavell William Hill (appellant) pleaded guilty to two counts of second-degree robbery resulting from an incident involving two victims. As to each count, he admitted to a sentencing enhancement that he had personally used a gun during the robbery. At sentencing, designating one robbery count as the principal offense and the other robbery count as the subordinate offense, the trial court imposed consecutive sentences for the robbery counts and the related gun-use enhancements under Penal Code,[1] section 1170.1, subdivision (a).

In the published portion of the opinion, we address appellant's contention that the trial court erred as a matter of law in calculating the sentence for the gun-use enhancement related to the subordinate robbery count. As part of the subordinate term, the trial court imposed three and one-third years (one-third of the upper term of 10 years) for the related gun-use enhancement. Appellant contends that under section 1170.1,

* This opinion is certified for partial publication only. (Cal. Rules of Court, rules 976(b) and 976.1.) The portions to be published are the two paragraphs of the introduction of the opinion, the Factual and Procedural Background, Part I. A. of the Discussion, and the Disposition.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

subdivision (a), the trial court was required impose one and one-third years, using the middle term of four years. We conclude that trial court was not so limited. It had the discretion to use any of the enhancement's terms of imprisonment—upper, middle, or lower—in calculating the subordinate term. In the unpublished portion of the opinion, we conclude that appellant's other arguments do not warrant remanding the matter for resentencing. Accordingly, we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the preliminary hearing transcript and the probation department report. In the early morning hours of January 16, 2002, appellant and his wife Tia Hill robbed J.Y. and C.C. at gunpoint. During the robbery, appellant pointed a gun at J.Y.'s forehead and also placed the weapon against C.C.'s chest. According to J.Y., appellant threatened to kill him. After taking the men's wallets, appellant and Tia fled with the robbery proceeds of about $260. J.Y. contacted the police, describing the incident and the get away car.

The police arrested appellant and his wife after stopping their car. Inside the car, the police found a gun loaded with six hollow-point bullets in the magazine and one hollow point round in the chamber. The gun's safety was on. Appellant had $227, believed to be money stolen from the victims. Shortly after the robbery, J.Y. and C.C. identified appellant and his wife. A few months after the robbery, the victims again identified appellant and his wife at the preliminary hearing.

Appellant was charged with two counts of robbery (§ 211), together with sentence enhancement allegations based upon his personal use of a firearm during the incident. (§§ 12022.5, subd. (a)(1); 12022.53, subd. (b).) He was also charged with possessing a weapon as an ex-felon (§ 12021, subd. (a)), and possessing ammunition as an ex-felon (§ 12316, subd. (b)).

In a negotiated disposition, appellant pleaded guilty to both counts of robbery and admitted one gun-use enhancement under section 12022.5, subdivision (a)(1), for each robbery count. He acknowledged that the maximum sentence the court could impose was 19 years four months. After appellant agreed that the remaining charges and

enhancements could be considered for sentencing purposes under *People v. Harvey* (1979) 25 Cal.3d 754, the court granted the People's motion to dismiss those counts and enhancements.

At sentencing, the trial court did not impose the maximum possible sentence of 19 years four months, as recommended by the probation department. Instead, the court imposed an aggregate term of 13 years four months, calculated as follows: (1) on the first count of robbery, designated as the principal offense, the court imposed the upper term of five years on that conviction and a consecutive term of four years (the middle term) on the related gun-use enhancement; and (2) on the second count of robbery, designated as the subordinate offense, the court imposed a consecutive term of one year (one-third of the middle term of three years) and a consecutive term of three years four months (one-third of the upper term of 10 years) on the related gun-use enhancement. (§§ 213, subd. (a)(2); 1170.1, subd. (a) & 12022.5, subd. (a)(1).)

## DISCUSSION

### 1. Imposition of One-Third of the Upper Term on the Subordinate Gun-Use Enhancement

#### *A. Section 1170.1, Subdivision (a) Permits Trial Court To Use Upper Term in Calculating Subordinate Gun Use Enhancement*

Appellant argues that the trial court exceeded its authority when it used the upper term to calculate the sentence on the subordinate gun-use enhancement. At the time of appellant's conviction and sentence, subdivision (a) of section 1170.1, provided: "[W]hen any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed . . . [t]he principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses*." (Italics added.) According to appellant, the reference to "one-

third of the middle term of imprisonment" in that part of subdivision (a) of section 1170.1 dealing with consecutive subordinate substantive offenses should be applied to the last clause of the subdivision dealing with sentences for subordinate enhancements.[2]

Because appellant argues, in effect, that a sentence on the subordinate gun use enhancement, calculated by using the upper term, " 'could not lawfully be imposed under any circumstance,' " the issue is reviewable even though he made no objection on this basis in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) However, we reject his contention that a failure to sentence as authorized under the statutory scheme constitutes "an abuse of discretion." Instead, we review de novo the interplay between sections 1170.1, subdivision (a), and 12022.5. (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 560.)

Appellant's argument is based upon the premise that when the sentencing scheme for the section 12022.5 enhancement was changed in 1989 from a determinate term to one of three terms, the Legislature neglected to change the terminology in section 1170.1, subdivision (a), to reflect that the trial court was required to impose only one-third of the middle term on a subordinate enhancement. We conclude to the contrary.

In 1977, section 1170.1, subdivision (a), was amended to provide: "[t]he subordinate term for each consecutive offense . . . shall include one-third of any enhancement imposed pursuant to Section . . . 12022.5." (Stats. 1977, ch. 165, § 17, p. 649.) At that time, section 12022.5 provided that a person who used a gun while committing certain specific felonies—including robbery—was subject to an enhanced sentence of not less than five years. (Stats. 1969, ch. 954, § 1, p. 1901.) Subsequently, in 1982, the Legislature amended section 12022.5 to change the enhanced sentence to an

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[2] Since appellant's sentence in November of 2002, Section 1170.1, subdivision (a), has been amended once, but the Legislature has not changed the clause requiring that the subordinate term include "one-third of the term imposed for any specific enhancements." (Stats. 2002, ch. 126, § 1; pp. 554-555, eff. Jan. 1, 2003; see Gov. Code, § 9600, subd. (a).)

additional term of two years for personal use of a firearm while committing or attempting to commit a felony. (Stats. 1982, ch. 1404, § 2.1, p. 5358.)

By 1989 amendments to section 12022.5, the Legislature (1) changed the enhancement's punishment from a determinate term of two years to "three, four or five years" and (2) added requirements that the court (a) impose "the middle term unless there [were] circumstances in aggravation or mitigation," and (b) "state its reasons for its enhancement choice on the record at the time of sentencing." (Stats. 1989, ch. 1044, § 5, p. 3635; ch. 1167, § 5, pp. 4529-4530; see Legis. Counsel's Dig., Assem. Bill No. 1504 (1989-1990 Reg. Sess.), 4 Stats. 1989, Summary Dig., p. 457.) Although section 1170.1 was also amended in 1989 (Stats. 1989, ch. 1044, § 1, pp. 3627-3628), and on several later occasions between 1989 and 1992, the Legislature did not change the language of subdivision (a), which continued to require a court to include in its subordinate term "one-third of any enhancements imposed pursuant to Section . . . 12022.5." (See Historical and Statutory Notes to § 1170.1.)

In 1994, Division One of the Fourth District addressed a challenge to the version of section 1170.1, subdivision (a), requiring that the subordinate term must include "one-third of any enhancements imposed pursuant to Section . . . 12202.5." (*People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1302 (*Sandoval*).) In holding that section 1170.1, subdivision (a), as then written, permitted the trial court to use the upper term in calculating the sentence for a subordinate gun use enhancement, the *Sandoval* court stated: "Sandoval also argues ' . . . the Legislature inadvertently failed to update section 1170.1 subdivision (a) to reflect the changes it made some twelve years later to section [ ] . . . 12022.5.' He then argues there is no authority for imposition of one-third the upper term rather than one-third of the midterm for subordinate gun use enhancements to be derived from section 1170.1, subdivision (a)'s language, which clearly states the term imposed 'shall include one-third of any enhancements imposed pursuant to Section . . . 12022.5.' [¶] We disagree. The plain meaning of the language is readily reconciled with the proposition that the Legislature meant exactly what it said. The trial court here

sentenced just as is mandated by section 1170.1, subdivision (a). There was no error." (*Ibid*.)

Three years later, in 1997, the Legislature clarified any ambiguity in subdivision (a) of section 1170.1, by amending the statute to read as it does today, that the subordinate term must "include one-third of *the term* imposed for any specific enhancements applicable to those subordinate offenses." (Stats. 1997, ch. 750, § 3, p. 8, italics added.) The sponsor of the 1997 amendment explained that: "[t]he bill would redefine 'subordinate term,' for purposes of imposing consecutive sentences, to mean one-third of the middle term of imprisonment prescribed for each felony conviction for which a consecutive term of imprisonment is imposed. The bill expressly provides that the subordinate term shall also include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (Sen. Com. on Public Safety, Analysis of Senate Bill No. 721 (1997-1998 Reg. Sess.) April 15, 1997, p. 3.)

In redefining the subordinate term in 1997, the Legislature " 'is deemed to be aware of the statutes and judicial decisions already in existence, and to have enacted or amended a statute in light therof.' " (*People v. McGuire* (1993) 14 Cal.App.4th 687, 694). The *Sandoval* court had decided that under the earlier version of section 1170.1, subd. (a), the trial court could use the upper term in calculating the sentence on a subordinate enhancement. Further, since 1989, the punishment for a gun use enhancement included a range of three possible terms and, effective November 30, 1994, the punishment had been increased to 3, 4, and 10 years (Stats. 1994 1st Ex. Sess., ch. 31, § 3, p. 8650, as amended by ch. 33, § 6, p. 8677; see Gov. Code, §§ 9600, subd. (a); 9605.) Given the clause limiting the trial court's discretion to imposing one-third of the middle term on the subordinate *substantive* offense, the legislature surely knew how to limit the trial court's discretion to one third of the middle term for a subordinate *enhancement*, if that was its intent. The juxtaposition of the language regarding the subordinate substantive offense and any related enhancement reflects purpose—not inadvertence. By not modifying the word "term" in the clause relating to the subordinate enhancements, the Legislature made clear what may previously have been implied—that

the trial court retains the discretion to use any one of the available terms in calculating the sentence for a subordinate enhancement. Where only one term may be imposed for the enhancement, the trial court must impose one-third of that term in calculating the sentence for a subordinate enhancement. (See *People v. Moody* (2002) 96 Cal.App.4th 987, 990-994.) But, when one of three terms is available, the trial court may choose the appropriate term in calculating the sentence enhancement, which includes not only the upper term but also the lower term, if warranted.

Appellant, in effect, asks us to rewrite section 1170.1(a) by adding the word "middle," to an otherwise unambiguous provision, and thereby limit the trial court's discretion in calculating the sentence for a subordinate gun-use enhancement. He argues that "[i]t makes no sense when imposing consecutive sentences under section 1170.1, the trial court is limited to one-third the middle term on the substantive offense in subordinate terms, but not so on the enhancement attached to that offense. Traditionally, the courts have always been so limited . . . ." However, appellant cites nothing in support of his argument that the trial courts have been so limited except the trial judge's query in this case regarding whether he was required to use the middle term in calculating the subordinate gun-use enhancement. The lack of published cases on the issue does not, as appellant contends, support a conclusion that trial courts have been reading section 1170.1, subdivision (a), to require the use of only the middle term in calculating the sentence on subordinate enhancements. Instead, the more likely scenario is that the trial courts have been appropriately choosing one of the three terms in calculating that sentence, as permitted under section 1170.1, subdivision (a)(1). (See *Sandoval, supra,*30 Cal.App.4th at p. 1302.)

More importantly, appellant ignores the fact that "firearm-use enhancements . . . do not constitute separate crimes or offenses, but simply are the basis for the imposition of additional punishment for the underlying substantive offense." (*In re Tameka C.* (2000) 22 Cal.4th 190, 198-199.) By construing "term" to include one of three possible terms in calculating the subordinate enhancement, we "advance[] the purpose of enhancements which provide for additional punishment," (*People v. Castro*

(1994) 27 Cal.App.4th 578, 586), tempered by the trial court's discretion to impose punishment commensurate with the underlying circumstances. That the trial court in this case chose to use the upper term, which represents a six year increase from the middle term, does not warrant a different result. We construe section 1170.1, subdivision (a), " 'as favorably to [appellant] as its language and the circumstances of its application may reasonably permit. . . .' [Citation.]" (*People v. Garcia* (1999) 21 Cal.4th 1, 10.)

*B. Trial Court Did Not Abuse Its Discretion In Using The Upper Term In Calculating The Sentence on the Subordinate Gun Use Enhancement*

Appellant further contends that even if the court was authorized to use the upper term in calculating the sentence on the subordinate gun-use enhancement, the court abused its discretion in using that term in this case. We disagree.

Appellant candidly admits that he is aware of no case that addresses the propriety of imposing the middle term on the principal gun-use enhancement and then imposing one-third of the upper term on the subordinate gun-use enhancement. He further concedes that when a defendant has robbed two victims on a single occasion, section 654[3] does not bar the trial court have imposing consecutive terms for two robberies, and enhancing each robbery count separately under section 12022.5. (See *People v. King* (1993) 5 Cal.4th 59, 70-79.) He contends, nevertheless, that "in the instances when [section 654] is not applicable, such as with robbery against multiple victims, at the very least, the courts cannot punish the same conduct differently when there are no facts to distinguish the two enhancements from one another." We need not resolve the issue posed by appellant because in this case, the trial court did not so abuse its discretion.

Appellant argues that the court gave no reason for its disparate treatment of the two gun-use enhancements. However, his argument is based upon isolated comments made by the trial court. The trial court explicitly remarked that appellant's background

[3] Section 654 provides, in relevant part, that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

and the nature of the current offenses would support an upper term on both gun-use enhancements. Appellant conceded the two valid aggravating factors mentioned by the court. In his presentence memorandum, appellant noted that: (1) the manner in which the crime was carried out indicated "that some planning preceded the instant robbery" (Cal. Rules of Court, rule 4.421(a)(8)), and (2) he was "on probation . . . at the time of the instant offense" (Cal. Rules of Court, rule 4.421(b)(4)). Given that the trial court could rely upon one valid aggravating factor to support an upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), "entirely disregard[ing] mitigating factors without stating its reasons" (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813), we conclude that the trial court's remarks were sufficient to satisfy the requirement that it state reasons for using the upper term. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1774 [a statement of reasons is not inadequate merely because it uses language of the Rules of the Court without elaboration].) We see no reason why the court's leniency with regard to the principal gun-use enhancement required the same leniency with regard to the subordinate enhancement. (Cf. *People v. Garcia* (1999) 20 Cal.4th 490, 500 [trial court may properly exercise its discretion to avoid imposing unjust sentence by striking prior conviction allegations with respect to some, but not all counts, even if current offenses do not differ from one another].).

We also reject appellant's argument that the matter should be remanded for resentencing because the trial court failed to specifically enunciate its reasons for its other sentencing choices. Neither appellant's presentence memorandum nor his counsel's argument at sentencing alerted the trial court to any such failure. Therefore, he has waived his right to challenge the court's sentence on that basis. (*People v. Scott* (1994) 9 Cal.4th 331, 354: *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693, disapproved on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

Finally, relying upon *People v. Swanson* (1983) 140 Cal.App.3d 571, 574 (*Swanson*), appellant argues that the trial court abused its discretion because it "reasoned backwards" to justify a particular sentence that it arbitrarily determined. The court in *Swanson* stated: "It requires no citation of authority that a sentencing judge is required to

base his decision on the statutory and rule criteria, on an analysis of legitimate aggravating and mitigating factors, and *not* on his [or her] subjective feeling about whether the sentence thus arrived at seems too long, too short, or just right. He [or she] is not permitted to reason backward to justify a particular length sentence which he [or she] arbitrarily determines." (*Ibid*.)

Nothing in this record indicates that the court determined a certain term of years was proper and then reasoned backward to reach that sentence. By its remarks, the court indicated that it was not necessary to impose the maximum term possible (19 years four months) upon all the offenses and enhancements in order to punish appellant and protect society. To that end, the court imposed the middle term on the principal gun use enhancement, which reduced appellant's aggregate sentence by six years. By exercising its discretion in imposing the middle term on the principal gun-use enhancement (four years instead of 10-year upper term), the court avoided what it believed would be an unjust sentence of 19 years 4 months.

As was stated in *People v. Calderon* (1993) 20 Cal.App.4th 82, 88: "[T]he *Swanson* court overstated the case. At some point a judge *should* evaluate the sentence in the aggregate. . . . Surely, a judge should not hand down a term believed to be excessive in the aggregate simply because a mechanistic micro-examination of the counts without regard to each other will yield such a term. [¶] . . . 'A judge's subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge's experiences with prior cases and the record in the appellant's case, cannot be ignored. A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria. [Citations].' "[4]

[4] In his opening brief, appellant also argues that the abstract of judgment did not accurately reflect the sentence imposed by the court. However, after the filing of appellant's opening brief, the trial court issued an amended abstract of judgment dated May 28, 2003, which now accurately reflects the imposed sentence. Accordingly, we do not address the issue, which is now moot.

## DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Pollak, J.

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|---|---|
| Trial Court: | Marin County Superior Court |
| Trial Judge: | Hon. John Stephen Graham |

Kathleen Woods Novoa, under appointment by the Court of Appeal, for Defendant and Appellant

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